Central Law Journal.

ST. LOUIS, MO., MARCH 6, 1908.

WHAT IS SUFFICIENT TO CONSTITUTE ONE A "MERCHANT" IN ORDER TO SUBJECT HIM TO THE PROVISIONS OF THE USUAL MERCHANTS' LICENSE TAX LAWS.

We have had not infrequent inquiries of late requesting us to give in outline the evidence required to show that one selling merchandise without a license is a "merchant," and therefore amenable to the penalties of the license laws.

It is quite well understood that every trader is not a merchant. A pedlar carrying his pack on his back or in a cart from house to house, is not a merchant. It is equally well established that one who sells merchandise from a regular and established place of business is a merchant. Between these two extremes we have some very doubtful cases. Thus, a farmer comes to town on certain days of the week with a load of hay and takes his regular stand in the hay market. Is he a merchant? No, because he cannot be said to have any established place of business, and his sales are intermittent, like those of a pedlar.

But suppose the place of business is an express office, and the party who takes the orders has the goods shipped from out of the state and delivered C. O. D., or consigned to a freight warehouse, whence he delivers the goods to the purchasers, is such a party a merchant? He is, if the sales he makes are regular, and not intermittent, and the evidence shows that the party is doing a regular business of merchandising, using a freight or express office as his base of operations.

This last point is well illustrated by the Supreme Court of Missouri in the case of Canton v. McDaniel, 188 Mo. 207, where the court said: "The law is clear that one individual transaction of selling one or several articles will not constitute one a merchant within the purview of section 8540, Revised Statutes, 1899, and of the ordinance of Canton. But this is not the whole of defendant's offending. That he was making a regular business of selling groceries is obvious; that he had obtained a large number of orders also appears; and that he filled the several orders at a warehouse. This was not a single transaction with one person, but numerous transactions with a large number of persons If the defendant could, as he did, sell and deliver to these various persons, goods, wares and merchandise for a profit at a store or place occupied by him for that purpose, and yet not be accounted a merchant in so doing, he could have thus sold and delivered a car-load or a train load of goods, and not be liable for failing to take out a license as a merchant. He could thus compete with all other merchants engaged in selling similar goods and wares to a great advantage, as they would necessarily be compelled to add the cost of their licenses in fixing their prices. Measured by every rule of justice and the statute, we think the facts, which were established, constituted the defendant a merchant."

NOTES OF IMPORTANT DECISIONS.

TRESPASS TO PERSON—ARREST.—In the recent case of Clark v. Tilton (N. H.), 68 Atl. Rep. 335, occurs an interesting discussion of the law relating to false imprisonment. Plaintiff was arrested on a charge of obtaining goods by false pretenses. After having been taken into custody an arrangement was made by which the creditor was secured and the prisoner released. The warrant on which the arrest was made was never returned into court. At the time of arrest plaintiff protested his innocence. The attorney who advised him that the only way to escape jail was to secure the creditor was the attorney who represented the creditor in the bankruptcy court. As to the liberty of the person, the court says: "Every arrest is prima facie a trespass; and, according to the rule of the common law, an officer could not avail himself of civil or criminal process to justify an arrest, unless he returned the writ or produced the prisoner with the warrant before the court to which the process was returnable, or unless it was made to appear

that the prisoner had so conducted with reference to the officer's omission that he had estopped himself from interposing the omission to the officer's use of the process to justify the arrest. In the service of criminal process, while it is the duty of an officer having made an arrest, to take the prisoner, as soon as circumstances will reasonably permit, before the court to which the warrant is returnable for hearing, still this duty is not so imperative that its performance, at least as between the officer and the prisoner, may not be omitted, and if omitted at the prisoner's request, of such a nature that the prisoner may not be estopped to interpose the omission to the officer's use of the warrant to justify such acts under it as were regular and lega * * *l. If the imprisonment is made use of to extort money from the prisoner, or to compel him against his will to pay a debt such conduct makes the imprisonment a duress, which will render every act done under it voidable, and makes those directing or participating in the improper use of the process liable as trespassers ab initio."

SOME OBSERVATIONS ON THE RIGHTS OF LANDOWNERS IN SUBTERRANEAN PERCOLATING WATER.

The law relative to the control that a landowner has over the subterranean waters on his land is of growing importance for several reasons. Water in some form is necessary to the very existence of man and to the enjoyment of his land. Without it his land becomes a desert, of no value for agricultural purposes and unfit for habitation. In parts of this country that are not blessed with a sufficient amount of rainfall to nourish and sustain vegetation, the supply of subterranean water which can be obtained by means of wells and shafts sunk into the earth becomes of immense value. With it the land is a garden, without it a desert. It is stated upon good authority that in some parts of California water is worth $1000 per inch of flow, and there would be a like value in other states of like soil and climate.

In the growing cities not located upon rivers or other bodies of water, the question of obtaining a supply of wholesome water for municipal purposes is of vital importance, and as in such cases the supply can only be obtained from subsurface water, this fact has greatly increased litigation of this character, and the courts are each year dealing with more cases involving the questions of rights in such waters.

Subterranean waters are usually divided into two distinct classes: First, those underground bodies or streams existing in a known and well defined channel; and second, those underground waters which ooze or percolate through the earth, called percolating waters. The courts have universally endeavored to apply the rules of law applicable to surface streams or bodies existing in well defined channels, to the waters of the class first above named.[1] But as to the rules of law applicable to the use of water of the second class or percolating water, the courts of this country and England are not entirely in concord. The English rule, and that of the earlier American cases is based upon the mixim, *"Cujus est solum ejus est usque ad inferos,"* (whose the soil is, his it is from the heavens to the depths of the earth) while the later American cases are based upon the maxim of the civil law, *"Sic utere tuo ut alienum non laedas"* (that one must use his own so as not to injure another.)

Hence we find the English rule to be that underground percolating waters belong to the soil, and the owner of the land may search and explore for and obtain them at will and use them at pleasure, though in so doing he might drain or entirely divert such waters from the lands of adjacent or neighboring owners to which they would otherwise necessarily pass.[2] The fact that the first English case upon this subject was decided in the year 1840,[3] shows the comparative-

(1) 30 Am. & Eng. Ent. Law, p. 311; Wheelock v. Jacobs, 70 Vt. 162, 43 L. R. A. 105, 67 Am. St. Rep. 659 and note; Pence v. Carney (W. (Va.), 52 S. E. Rep. 702, 6 L. R. A. (N. S.) 266. Underground waters are presumed to be percolating waters until the contrary is shown. See 30 Am. & Eng. Enc. Law, p. 311; Barclay v. Abraham, 121 Iowa, 619, 64 L. R. A. 255, 10 Am. & Eng. Dec. in Eq. 716 and note; Acton v. Blundell, 12 Mees & W. 335.

(2) Hammond v. Hall, 10 Sim. 552, 4 Jur. 694; Acton v. Blundell, 12 Mees & W. 324; Dickinson v. Grand Junction Canal Co., 7 Exch, 301, 21 L. J. Exch. (N. S.) 241; Broadbent v. Ramsbotham, 11 Exch. 602; Grand Junction Canal Co. v. Shugar, L. R. 6 Ch. App. 483; Bradford v. Pickles, A. C. 587; New River Co. v. Johnson, 2 El. & El. 435, 8 Week. Rep. 179. See the following American cases following the English rule: Frazier v. Brown, 12 Ohio St. 294; Metcalf v. Nelson, 8 S. D. 87, 56 N. W. Rep. 911; Huber v. Merkel, 117 Wis. 355, 62 L. R. A. 589, 98 Am. St. Rep. 933, 94 N. W. Rep. 354; Taylor, Adm'r v. Fickas, 69 Ind. 172; Greenleaf v. Francis, 18 Pick. 117; Roath v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352. See Ang. Waters, Sec. 114 where cases are collected.

(3) Hammond v. Hall, 10 Sim. 552, 4 Jur. 694.

ly modernness of the subject. The case of Acton v. Blundell,[4] decided in exchequer chamber in the year 1843, is regarded as the leading English case upon the subject of percolating waters. It was an action for damages occasioned by working a coal mine on adjoining land, which interfered with water which was flowing underground to plaintiff's spring. The lower court instructed the jury, "that, if the defendants had proceeded and acted in the usual and proper manner in the land for the purpose of working and mining a coal mine therein, they might lawfully do so." After holding that this instruction was a correct statement of the law, the Chief Justice said: "This case falls within that principle which gives to the owner of the soil all that lies beneath the surface; that the land immediately below is his property, whether it is solid rock, or previous ground, or venous earth, or part soil and part water; that the person who owns the surface may dig therein and apply all that is there found to his own purposes at his free will and pleasure; and that if in the exercise of this right he intercepts or draws off the water collected from underground springs in his neighbor's well this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot be the ground of an action." The doctrine thus expressed by the learned court has been called the "*cujus est solum* doctrine," and, as is tersely said by an American court, "furnishes a rule of easy application, and saves a world of judicial worry."[5]

Another interesting English case upon this subject is the case of Chasemore v. Richards,[6] where a mill owner sought to obtain damages from a town who had dug a deep well near the river upon which the mill was operated, and by pumping large quantities of water therefrom materially diminished the flow of the river and prevented the use of his mill as efficiently as before. The case was first decided in exchequer chambers in favor of the defendant, Mr. Justice Coleridge dissenting, on the grounds that the use of the water by the city to such an extent was not a reasonable one. On appeal to the House of Lords the judges held unanimously for the defendant sustaining fully the *cujus est solum* doctrine, without qualification, and this was affirmed by the House. But Lord Wensleydale, however, who had doubts, pronounced an opinion which seems to the writer to be in harmony with the doctrine of "reasonable use" as pronounced by the later American cases. His Lordship said, "According to the rule of reason and law, *Sic utere tuo ut alienum non laedas*, it seems right to hold that * * * * (a landowner) ought to exercise his right in a reasonable manner, with as little injury to his neighbor's rights as maybe. * * * But I doubt very greatly the legality of the defendant's acts in abstracting water for the use of a large district in the neighborhood, unconnected with his own estate, for the use of those who would have no right to take it directly themselves, and to the injury of those neighboring proprietors who have an equal right with themselves. It does not follow that each person who was supplied with water by the defendant could have dug a well himself on his own land and taken the like quantity of water, so that the defendant may have taken much more than would have been abstracted if each had exercised his own right."

Another English case which in some respects seems to conflict with the Chasemore case, is the case of Grand Junction Canal Co. v. Shugar,[7] where the right to intercept the waters of a spring, the source of supply of a running stream was asserted. In denying this right Lord Hatherby said: "You have a right to all the water which you can draw from the different sources which may percolate underground, but that has no bearing at all on what you may do with regard to water which is in a defined channel, and which you are not to touch. If you cannot get at the underground water without touching the water in a defined surface channel, I think you cannot get at it at all."

One of the main arguments used in support of the doctrine of the English cases is, that a landowner owns the water percolating in his soil, as he does the rock or minerals therein, and that he should have the same right to use such water as he has to use the minerals, and that if the owner cannot destroy a stream or natural pond by drawing the water from it through percolation, then he could not drain a marsh, or clear his land if these operations would tend to decrease the percolation from a stream or natural pond upon a neighbor's land. An early Ohio case[8]

(4) Acton v. Blundell, 12 Mees. & W. 324.

(5) Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. Rep. 663, 74 Pac. Rep. 766.

(6) Chasemore v. Richards (in Exch.) 2 Hurlst. & N. 168 (in House of Lords) 7 H. L. Cas. 349, 7 Week. Rep. 685.

(7) Grand Junction Canal Co. v. Shugar, L. R. 6 Ch. App. 483.

(8) Frazier v. Brown, 12 Ohio St. 294. See also Wheatley v. Baugh, 25 Pa. 528, 64 Am. Dec. 72. See article in 14 Alb. Law J. 62.

following the English rule, thus states the reasons for the same: "In the absence of express contract and of positive authorized legislation as between proprietors of adjoining lands, the law recognizes no correlative rights in respect to underground waters percolating, oozing, or filtrating through the earth, and this mainly from considerations of public policy: (a) Because the existence, origin, movement, and course of such waters, and the causes which govern and direct their movements, are so secret, occult, and concealed that an attempt to administer any set of legal rules in respect to them would be involved in helpless uncertainty, and would be, therefore, practically impossible; (b) Because any such recognition of correlative rights would interfere, to the material detriment of the commonwealth, with drainage, and agriculture, mining, the construction of highways and railroads, with sanitary regulations, building, and the general progress of improvement in works of embellishment and utility."

While the early rule both in England and this country, is as stated above, the weight and trend of the recent authorities in America is to qualify the early rule by limiting the use by the owner of the land who searches therein, and produces percolating water, to a reasonable and beneficial use of such water, where to use it otherwise would deprive the owners of adjacent and neighboring lands of the enjoyment of the waters of their lands, in other words the recent cases recognize the correlative rights of adjacent land owners in such waters and limits the landowner's use thereof to a reasonable one, taking into consideration the circumstances in each case.[9]

The geography of this country has caused different rules to be applied as to the control of subterranean waters here, than those applied in England. It is evident that rules which might work well in an island like England, with a bounteous supply of water, might operate disastrously if indiscriminately applied to so diversified a continent as this, with its well watered lands, and its arid stretches, and desert lands. As is well stated in a recent case, "nothing is better settled than that the fundamental principles of right and justice on which the common law is founded, and which its administration is intended to promote, require that a different rule should be adopted whenever it is found that, owing to the physical features and character of a state, and the peculiarities of its climate, soil, products, and water supply, the application of a common law rule tends constantly to cause injustice and wrong, rather than the administration of justice and right."[10]

Of the English cases, and of the common law on this subject, Mr. Farnham, in his late work on Waters & Water Rights[11] says: "When it is remembered that the first English case dealing with percolating water arose in 1840, and that it was not decided that the landowner might exhaust the water to furnish a municipal water supply until 1860, it will be at once seen that there was no English law on the subject at the time the common law was adopted by statute, in most of the American states, and that the opinion of the American courts as to what is the common law is as good as subsequent English courts. Therefore, in any case, the question can be decided on its merits, giving the English decisions the weight to which they are entitled, but without the necessity of regarding them as binding precedents."

By a review of several of the recent American decisions upon the question of the rights of landowners in percolating waters, the tendency of the modern decisions may be best seen. In the case of Forbell v. City of New York[12] the city sunk wells and installed a pumping station near the plaintiff's land, and the pumping had the effect to lower the underground water table on his land and thus made it unfit for the cultivation of celery or water cresses. In the lower court a perpetual injunction was obtained against the city from so operating their station and injuring plaintiff's land, damages in the sum of $6,000 were also awarded him. On affirming the judgment of the lower court, and upholding that of

(9) Bearing on the rule of the reasonable use of, and the correlative right to percolating water by landowners see: Forbell v. New York, 164 N. Y. 522, 51 L. R. A. 695, 79 Am. St. Rep. 666, 58 N. E. Rep. 644; Willis v. Perry, 92 Iowa, 297, 26 L. R. A. 124; Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276; Stillwater Water Co. v. Farmer, 89 Minn. 58, 60 L. R. A. 875, 99 Am. St. Rep. 541, 93 N. W. Rep. 907; Gagnon v. French Lick Springs Hotel Co., 163 Ind. 687, 68 L. R. A. 175, 72 N. E. Rep. 849; Katz v. Walkinshaw, 141 Cal. 116, 64 L. R. A. 236, 99 Am. St. Rep. 35; Erickson v. Crookston Waterworks, etc. Co. (Minn.), 111 N. W. Rep. 391.

(10) Erickson v. Crookston, etc. Co. (Minn.), 111 N. W. Rep. 391.

(11) Farnham on Waters & Water Rights, Vol. 3, p. 2718.

(12) Forbell v. City of New York, 164 N. Y. 522, 51 L. R. A. 695, 79 Am. St. Rep. 666, 58 N. E. Rep. 644. See also Smith v. Brooklyn, 18 App. Div. 346, 46 N. Y. Supp. 141.

the appellate division of the supreme court, Mr. Justice Landon, speaking for the New York court of appeals, said: "The defendant makes merchandise of the large quantities of water which it draws from the wells that it has sunk upon its two acres of land. The plaintiff does not complain that any surface stream or pond or body of water upon his own land is thereby affected, but does complain, and the courts below have found, that the defendant exhausts his land of its accustomed and natural supply of underground or subsurface water, and thus prevents him from growing upon it the crops to which the land was and is peculiarly adapted, or destroys such crops after they are grown or partly grown. The defendant does not take from its own land simply its natural or accustomed supply or holding, but by means of its appliances and operations it takes and appropriates a large part of the natural and accustomed supply or holding of the plaintiff's land." After stating the general rule as to a landowner's right to use all the percolating water that might be found under his land, and giving the reasons therefor the court further said: "But there are features in this case to which these reasons do not apply. As already intimated, the defendant installed its pumping plant knowing that the underground operation and habit of this store of water in its own and neighboring lands, including the plaintiff's, a total area of from five to eleven square miles, would enable it to capture the greater part of it. In the cases in which the lawfulness of interference with percolating waters has been upheld, either the reasonableness of the acts resulting in the interference, or the unreasonableness of imposing an unnecesary restriction upon the owner's dominion of his own land, has been recognized. In the absence of contract or enactment, whatever it is reasonable for the owner to do with his subsurface water, regard being had to the definite rights of others, he may do. He may make the most of it that he reasonably can. It is not unreasonable, so far as it is now apparent to us, that he should dig wells and take therefrom all the water that he needs in order to have the fullest enjoyment and usefulness of his land, as land, either for purpose of pleasure, abode, productiveness of soil, trade, manufacture, or for whatever else the land as land may serve. He may consume it, but must not discharge it to the injury of others. But to fit it up with wells and pumps of such pervasive and potential reach that from their base the defendant can tap the water stored in the plaintiff's land, and in all the region thereabout, and lead it to his own land, and by merchandising it prevent its return, is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and others whose lands are thus clandestinely sapped, and their value impaired."

The courts of New Hampshire were among the first in this country to recognize the doctrine of correlative rights of landowners respecting the appropriation and use of percolating waters.[13] These courts applied the maxim, "*Sic utere tuo ut alienum non laedas*," and followed the reasoning of Lord Wensleydale in his opinion in the Chasemore case.

The case of Stillwater Water Co. v. Farmer[14] is a well considered one much cited as a leading case upon this subject in America. It was an action brought to restrain the defendant from interfering with subsurface waters, which, percolating through the ground, served in part to supply a spring situated upon plaintiff water company's property, which spring the latter used to furnish its patrons, the people of Stillwater, with water for domestic use. The action was dismissed when plaintiff rested at the trial below upon the ground that no cause of action had been established. In reversing the case, Mr. Justice Collins, speaking for the Supreme Court of Minnesota, said: "The question in this case, reduced to its last analysis, involves the defendant's right to collect by drainage these fugitive subsurface waters, and then to waste them, to the annihilation of plaintiff's business, and to the great discomfort and injury of the people who depend upon the plaintiff for water for domestic use. * * If the collection of these waters was essential and necessary that defendant might use them for any reasonable purpose, or, even if, from the evidence, it could be found that he was competing with the plaintiff, and proposed to use the water for a public purpose, or if it were necessary that the natural conditions of his land should be disturbed and subsurface waters drained in order to improve it, then there would be very little doubt as to the rule to be applied, and of the correctness of the conclusion reached by the court below. But such is not the situation presented by this record. The

(13) Bassett v. Salisbury Mfg. Co., 43 N. H. 569, 82 Am. Dec. 179; Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276.

(14) Stillwater Water Co. v. Farmer, 39 Minn. 58, 60 L. R. A. 875, 99 Am. St. Rep. 541, 93 N. W. Rep. 907.

facts are not seriously in dispute, and they have compelled defendant's counsel to take the position that their client, as owner of the soil, has an absolute and unqualified right to collect, divert, and waste these percolations, although the plaintiff by these apparently unnecessary and capricious acts, is, and will be further, to a greater extent, and almost wholly, deprived of waters heretofore appropriated and used by it to supply the people of Stillwater with a pure article for domestic purposes, and to their great injury. * * * But we have arrived at the conclusion that, irrespective and independent of his motive, he has no absolute legal right to collect these subsurface waters solely that they may be wantonly wasted, and that he may be restrained from so doing. It is true that this action must be disposed of upon principles involving natural rights of property, and, while we are first to look to the extent of the defendant's ownership in the land in which he has dug the trench, we are not to altogether lose sight of the fact that he has collected the water for no worthy purpose, and that he is squandering it, to the injury of the public. Having this very situation in mind, a learned textbook writer has suggested that the maxim, *Cujus est solum, ejust est usque ad coelum,* is not strictly and absolutely applicable to all of the relations of adjoining land proprietors. 'It is obvious,' he says, 'that neighbors cannot be mutually indifferent to each other's doings.' As applicable to their relations and their acts, this author further says: 'The common law, otherwise so jealous of such interference between the owner and his property, imposes upon him the simple rule, *Sic utere tuo ut alienum non laedas.*'[15] * * * We therefore formulate and announce the rule governing the facts here to be that, except for the benefit and improvement of his own premises, or for his own beneficial use, the owner of land has no right to drain, collect or divert percolating waters thereon, when such acts will destroy or materially injure the spring of another person, the waters of which spring are used by the general public for domestic purposes. He must not drain, collect or divert such waters for the sole purpose of wasting them."

In a recent Indiana case[16] the court uses similar reasoning in holding that a landowner cannot maliciously drill and pump water from a subterranean channel, to the injury of an adjacent landowner, who has a valuable mineral spring upon his land which was injured by such pumping. The court there said: "The strong trend of the later decisions is toward a qualification of the earlier doctrine that the landowner could exercise unlimited and irresponsible control over subterranean waters on his own land, without regard to the injury which might thereby result to the lands of other proprietors in the neighborhood. Local conditions, the purpose for which the landowner excavates or drills holes or wells on his land, the use or nonuse intended to be made of the water, and other circumstances have come to be regarded as more or less influential in this class of cases, and have justly led to an extension of the maxim, *'Sic utere ut alienum non laedas'* to the rights of landowners over subterranean waters, and to some abridgment of their supposed power to injure their neighbors without benefiting themselves." It should be stated, however, that the subterranean stream tapped in this case was one having a more definite channel than mere percolating water, but the court cites cases dealing with percolating waters as authority for its holding.

In the case of Pence v. Carney,[17] the question of the reasonableness of the use of percolating waters was considered, and the court, while holding squarely that the defendant in the case could not unreasonably use such water, held further that the evidence did not show an unreasonable or a malicious use thereof. On the question as to the means of ascertaining what a reasonable use would consist of, the court said: "We must yield assent to the late doctrine of reasonable and beneficial use, which constitutes rather a qualification of the early rule than an announcement of a new rule. The later doctrine seemes to us to be sustained by the weight of authority, as well as by the weight of reason. What is a reasonable and beneficial use under this late doctrine must be determined in the light of the facts and circumstances appearing in each case as it arises. We do not desire to be understood as announcing any fixed rule applicable to all cases as to the question of what constitutes such reasonable and beneficial use. Such rea-

(15) Quotation from Angell, Water Courses, 7th ed. Sec. 114.

(16) Gagnon v. French Lick Springs Hotel Company, 163 Ind. 687, 68 L. R. A. 175, 72 N. E. Rep. 849.

(17) Pence v. Carney, 58 W. Va. 296, 6 L. R. A. (N. S.) 266, 112 Am. St. Rep. 963, 52 S. E. Rep. 702.

sonable and beneficial use has often been understood and held to mean use for any purpose for which the owner of the land upon which underground percolating waters are found might legitimately use and enjoy his land." In most jurisdictions the question of reasonableness would be a question for the jury.

In the case of Barclay v. Abraham,[18] the supreme court of Iowa in a well considered case recognizes the correlative rights of landowners in underground percolating water, and after a careful review of the authorities said: "Certainly no good reason can be found for allowing the owner of land to draw subsurface water therefrom merely to waste, when this results in draining like water from his neighbor's land, to his detriment in its use and enjoyment. Water moves so readily from one place to another that any definite portion of it cannot be said to be the property of the owner of the soil until in some way reduced to control. * * * Possibly he may waste that on his own land, if he can do so without draining water from his neighbor's. * * * But the prevention of carrying the water from the land of the owner for the purpose of commerce or waste cannot retard the improvement of the land itself, and there is no just ground for tolerating such diversion when the direct result is to deprive the adjoining landowner by the incidental drainage of their land of a supply of water from the same natural reservoir. This would be extracting the subterranean water from the adjoining land to its injury, without any counter benefit to the land through which taken."[19]

A very interesting and instructive case, and one which may well be considered a leading one upon this subject, and which illustrates the growth of the law upon the subject, and its adaptability to new geographical conditions, was decided by the supreme court of California in the year 1902.[20] The action was brought to enjoin defendant from drawing off and diverting water from an artesian belt which was in part on or under the premises of the plaintiffs, and to the water of which they had sunk wells, thereby causing the water to rise and flow upon the premises of the plaintiffs, and which they ever had constantly so flowed for twenty years before the wrong complained of was committed by defendant. The water so obtained was used for domestic purposes and for irrigating the plaintiff's land which would be valueless without such supply of water. A judgment for the defendant was obtained in the lower court, but in reversing the same, the higher court speaking by Temple, J. said: "We have derived our law in respect to subterranean waters, as in other respects, mostly from England, but in regard to this matter the first cases are quite modern. Even yet the textbooks on water rights have but little to say upon the subject of percolating water. Such law as has been made upon the subject comes from countries and climates where water is abundant, and its conservation and economical use of little consequence, as compared with a climate like southern California. * * * Percolating water or water held in the earth is the main source of supply for domestic uses and for irrigation, without which most lands are unproductive. * * * It is a general rule—in fact, a universal principle of law—that one may make reasonable use of his own property, although such use results in injury to another. But the maxim, *Cujus est solum ejus est usque ad inferos*, furnishes a rule of easy application, and saves a world of judicial worry in many cases. And perhaps in England and in our Eastern states a more thorough and minute consideration of the equities of parties may not often be required. The case is very different, however, in an arid country like southern California, where the relative importance of percolating water and water flowing in different water courses is greatly changed. And it seems to me a great mistake is made in supposing that, if the plenary property of a landowner in percolating water is denied, the alternative is to apply to such water all the rules which apply to the use of water flowing in water courses

(18) Barclay v. Abraham, 121 Iowa, 619, 64 L. R. A. 255, 100 Am. St. Rep. 365 and note, 96 N. W. Rep. 1080.

(19) In several cases the courts compare percolating water to natural gas. It is well settled that natural gas cannot be pumped from an underground reservoir to the injury of other landowners having gas wells upon their premises which tap such reservoir. See Manufacturers Gas & Oil Co. v. Ind. Nat. Gas & Oil Co., 155 Ind. 461. The legislature may forbid its waste. Ohio Oil Co. v. State, 150 Ind. 698, same case on appeal to the U. S. supreme court, 177 U. S. 190, 44 L. Ed. 729. See also article in 60 Cent. L. J. 465.

(20) Katz v. Walkinshaw, 141 Cal. 116, 64 L. R. A. 236, 99 Am. St. Rep. 35 and extensive note, 70 Pac. Rep. 663, 74 Pac. Rep. 766; See also later case of Newport v. Temescal Water Co. (Cal.), 87 Pac. Rep. 372, 6 L. R. A. (N. S.) 1099.

having defined channels. The entire argument for what may be called the *'cujus est solum* doctrine' consists in showing that some recognized regulation of riparian rights would be inapplicable. It is said, for instance, that the law of riparian rights requires each proprietor to permit the water to flow as it was accustomed to flow. Apply this rule to subsurface water, and no one could drain his land, for he thereby prevents the water from flowing as it was accustomed to flow by percolation to his neighbor. The common law method in the supposed case would be to apply the principle to the new case, although some judge-made rule as to how it should be applied might stand in the way. The principle is clearly applicable, a riparian owner may not divert the water, because he would thereby injure his neighbors who have equal rights in the stream. * * * Such ownership is 'but as an aggregation of qualified principles, the limits of which are prescribed by the equality of rights, and the correlation of rights and obligations necessary for the highest use of land by the entire community of proprietors.' * * * I think it clear that the American cases do not require us to hold that the maxim, *Sic utere tuo*, does not limit the right of the landowner to the use of subsurface water, but, on the contrary, all the cases in which the question has been discussed held or admit that such maxim should limit such right where justice requires it. Such, I think, is the proper rule."

Perhaps the latest authority upon this question is the case of Erickson v. Crookston Waterworks, etc., Co.[21] decided by the supreme court of Minnesota in the year 1907, where that court, after a review of the authorities, held that there are correlative rights in percolating waters and that adjoining landowners were confined to a reasonable use thereof.

From a somewhat thorough review of the authorities upon this subject, it seems to the writer that the difference between the rules of law governing underground streams existing in defined channels, and those governing underground percolating waters is now virtually extinguished. There is little or no dispute but that a landowner can use but a reasonable amount of an underground stream flowing in a defined channel, as the courts apply the same rules of law that govern the riparian rights in water courses flowing above ground.[22] On the other hand the weight of American authority is that a landowner cannot tap or waste percolating water to the injury of an adjacent landowner, but is restricted to a reasonable use thereof.[23] Hence is not really the same rule of "a reasonable use" applied in both cases, and have we not found in this rule a means of solution to the many intricate problems arising out of the question of subterranean water rights?

SUMNER KENNER.

Huntington, Ind.

(21) Erickson v. Crookston Waterworks, P. & L. Co. (Minn.), 111 N. W. Rep. 391, 8 L. R. A. (N. S.) 1250. See the following as to percolating waters: 30 Am. & Eng. Enc. of Law (2d ed.), p. 314; Farnham on Waters & Water Rights, Vol. 3, p. 2712; Extensive note to the case of Barclay v. Abraham, 10 Am. & Eng. Dec. in Eq. 704, also on page 721 where the writer says: "The modern doctrine applies with especial force to the case of mineral springs fed by percolating waters, on account of the great value of many of these springs, and the magnitude of the injury that may be caused by an interference with their source of supply." Wheelock v. Jacobs, 67 Am. St. Rep. 659 and note; East v. Houston & T. C. R. Co. (Tex. Civ. App.), 77 S. W. Rep. 646, also 98 Tex. 146, 81 S. W. Rep. 279, 66 L. R. A. 738; St. Amand v Lehman, 120 Ga. 253, 47 S. E. Rep. 949; Dexter v. Providence Aqueduct Co., 1 Story, 387, Fed. Case No. 3864; See note to Southern P. R. Co. v. Dufour (Cal.), 95 Cal. 615, 19 L. R. A. 92. Upon the question of the malicious use of water see: Springfield Waterworks Co. v. Jenkins, 62 Mo. App. 74; Haldeman v. Bruckhart, 45 Pa. St. 514, 84 Am. Dec. 511; Wyandot Club v. Sells, 6 Ohio N. P. 64.

(22) See authorities cited under (1) in this article.

(23) See articles cited under (21) in this article.

(24) Pence v. Carney, 58 W. Va. 296, 6 L. R. A. (N. S.) 266, 112 Rm. St. Rep. 963, 52 S. E. Rep. 702.

COVENANT—RESTRICTIONS ON USE OF REAL PROPERTY.

McDONALD v. SPANG.

Supreme Court of New York, Special Term, Erie County. June, 1907.

Where it was covenanted in a deed of land given prior to its subdivision that no dwelling house erected thereon should be nearer than 25 feet to the front street line, and a deed of a lot given subsequent to the widening of the street on which that lot abutted contained a similar covenant, a dwelling house less than 25 feet from the front street line after the widening of the street would be a violation of the covenant, though 25 feet from the original front street line.

A veranda is a part of a dwelling house, within the meaning of a covenant not to erect any dwelling house nearer than 25 feet to the front street line, and the house, including the veranda, should be set back 25 feet therefrom.

A two-family house is not in violation of a

covenant against the erection of any building to be used or occupied "for any trade, manufacture, etc., or in any objectionable manner whatever."

That a covenant against the erection of dwelling houses within a certain distance of the front street line has been violated by others is without prejudice to the right of one who would be affected by a dwelling house erected within that distance to compel its observance.

WHEELER, J.: This is a motion to continue pendente lite a preliminary injunction restraining the defendant from erecting a house on his lot, located on the east side of Parkside avenue, in the city of Buffalo, nearer than 25 feet from his front street line, in alleged violation of covenants contained in deeds from the common grantors of the plaintiff and defendant. The plaintiff and defendant own adjoining lots, and it is conceded got title to their respective properties from a common source. The propertyn in question formed a part of a large tract formerly owned by the Buffalo Cement Company, which in 1889 conveyed the tract to George L. Thorne and Byron P. Angell, subject to the following restrictions:

"The parties of the second part further agree, for themselves and their heirs and assigns, that the said land shall be subdivided, sold and used in lots of not less than forty (40) feet frontage on all the said streets and not exceeding two hundred and fifty (250) feet in depth, and agree that no part of said land shall be used or occupied for any trade, manufacture, saloon or stable for hire, or in any objectionable manner whatever, and that no nuisance shall be maintained or allowed by themselves or their tenants or subtenants; and for the mutual benefit of all persons now or hereafter to be interested in said land or parts thereof, it is agreed that the said lands shall be used for residence and dwelling purposes only, and the usual and natural used connected therewith, and no other; that all dwellings heerafter erected on the northerly side of Crescent avenue shall cost not less than $2,000, and on the southerly side of Crescent avenue not less than $2,500, and on all other streets indicated on said plan and map not less than $3,000; that each and every dwelling house shall beerected not nearer than twenty-five (25) feet of the front street line of the lot; and that any barn on a lot adjacent to Amherst street shall be erected at least twenty (20) feet from Amherst street."

It appears by the affidavit read by the defendant that Thorne & Angell subdivided the tract and conveyed out th lots in question, including both that of the plaintiff and defendant, by deeds containing the following restrictions:

"This conveyance is made and taken with the express understanding that the above-described premises shall be used for residence or dwelling purposes only, and the usual and natural uses connected therewith, and no other, and that any and all dwellings erected thereon shall cost not less than $3,000, and shall be erected not nearer than twenty-five (25) feet to the front ine of the lot."

The plaintiff and defendant each acquired title to their respective properties by mesne conveyances from Thorne & Angell, and when the defendant took title to his lot he accepted a deed containing the same restrictions embodied in the deed from Thorne & Angell. It further appears that, subsequent to the conveyances by Thorne & Angell, Parkside avenue was widened from a 60-foot street to an 80-foot street by proceedings taken by the city of Buffalo, and by reason of this widening the present east side of Parkside avenue is now 7½ feet easterly of the original line of that avenue.

The defendant contends that, while his building is within less than 25 feet of the original 25 feet of the present line as it now exists, it is 25 feet away from the original line, and therefore the restrictive covenants contained in the deeds referred to are not violated. In this connection the court does not concur. Whether we look to the deed from the present company, or to the deed from Thorne & Angell, is not important here; for both deeds contain covenants to the effect that all dwellings shall be erected "not nearer than twenty-five (25) feet of the front street line of the lot." It was the manifest purpose and intent of these covenants to preserve and keep open a clear space between the house and the street of 25 feet. for the purpose of light, air and general attractiveness. The important consideration was this clear and open space between the street and the dwelling, and not that the house should be a given distance from a given line. In other words, the restriction must be construed to refer to the changed line as subsequently established, so as to carry out the anifest purpose of the grantors and to secure to their grantees the benefits intended to be conferred.

This view as to the construction to be given to the clause is borne out by the fact that at the time the cement company's' deed was given the tract had not been subdivided, and had no reference to any fixed line, but was intended to secure 25 feet clear between the dwelling and the street, wherever the street line might b established. The defend ant,by accepting his deed from his immediate grantor, seems to have acquiesced in and assented to this construction; for in this deed he covenanted "that any and all dwellings erected thereon * * * shall be erected not nearer than twenty-five

(25) feet to the front line of the lot." The defendant's deed was given to him in April, 1907, long after the widening of Parkside avenue; and if it had been intended that these restrictions should refer to the old and original line of aPrkside avenue, instead of to the present line, the deed of conveyance to the defendant should have so read. Such was not the intention of the parties, or the construction to be placed on the various deeds in question. The intention of the parties is to govern. We therefore must conclude that the building now in process of erection by the defendant violates the covenants prescribing the distance from the street line within which dwellings may be erected.

The building also is shown by the affidavits to contemplate the addition of a veranda in front, which would bring the building still nearer the street line. Defendant's counsel contends that the veranda constitutes no part of the building, and in computing distances may be disregarded in determining whether or not the dwelling under erection is 25 feet from the street line. As this question may become important in determining the future rights of the parties, it is but right to here indicate the views of the court that a veranda is a part of the dwelling within the meaning of the covenants in question, and that the building, including the veranda, should be set back at least 25 feet from the present street line. The following cases seem to support this view: Skinner v. Allison, 5 App. Div. 47, 66 N. Y. Supp. 288; Sanborn v. Rice, 129 Mass. 396; Levy v. Schreyer, 27 App. Div. 282, 50 N. Y. Supp. 584, affirmed 177 N. Y. 293, 69 N. E. 598.

It is further contended by plaintiff's counsel that the covenant in the deed from the cement company to Thorne & Angell is violated because the defendant is engaged in the erection of a two-family or flat house; whereas the deed in question contains against the erection of any building to be used or occupied "for any trade, manufacture, saloon, or stable for hire, or in any objectionable manner whatever." The court cannot discover how a two-family house can be fairly deemed to be legally objectionable." Covenants of this character are to be strictly construed against the covenant, and there must be shown to be a clear and plain violation of them to justify the interposition of a court of equity to restrain. Clark v. Jammes, 87 Hun, 215, 33 N. Y. Supp. 1020. Perhaps two-family houses may not be as desirable in a residence district like this as a one-family house. Nevertheless that fact cannot make them legally "objectionable." When this word was used in the original deed, something more must be deemed to have been intended than a mere matter of sentiment, and if the continuance of the injunction depended on the mere question that the uilding under process of erection is to be a two-family house the plaintiff would necessarily fail. Tn justify an injunction because the building course of erection is a two-family house would necessitate the court's holding that such a house is not to be used for "residence and dwelling purposes," which is expressly authorized by the deeds in question. The very statement of the case makes plain the untenableness of the plaintiff's position in this regard.

The defendant contends the covenant relating to the distance of dwellings from the street has been violated by others, and therefore he should not be held to a strict observance of them. The affidavits disclose but one violation on the entire street; but that there has been one or more violations of a special covenant will not prevent the plaintiff affected by the defendant's acts compelling him to obey the covenants. Zipp v. Barker, 40 App. Div. 6, 57 N. Y. Supp, 569; Levy v. Halcyon Hotel Co., 45 Misc. Rep. 291, 92 N. Y. Supp. 231.

As the covenants in question run with the land, and may be enforced by those benefitted by them, it follows that the injunction heretofore granted must be continued, in so far as it restrains the defendant from erecting the building described in the complaint nearer than 25 feet from the present street line. The security given should, however, be increased to the sum of $1,500.

Let an order be entered accordingly, with $10 costs of this motion.

Note.—Effect of Violation by other Covenantees of Covenant Restrictions in Deeds.—That a complainant may enjoin violations of restrictions which especially affect him, although other covenantees than the defendant may have violated the covenant, seems well sustained by the authorities, and has the support of reason. Thus in Zipp v. Barker (N. Y.), 40 App. Div. 6, a showing was made that others had violated the restriction and all of the parties affected thereby save two had signed a paper stating that they desired to use their lots free from the restriction of a 15-foot building line. The character of the neighborhood had so changed that the property was no longer suitable for residence property, but was very valuable as business property. The court says: 'The defendants contend that it was error to exclude a paper signed by all except two of the owners of property in Elm Place, to show that such persons desired to use the courtyard space free from the restriction of the covenant. The exclusion was proper. It is too plain for argument that no such consent could affect the plaintiff's rights, even if all except herself had assented thereto." The violation complained of, it was shown, obstructed plaintiff's view, and the injunction was granted because plaintiff was injured by the violation, her building being 15 feet back on the building line, and hidden by

the building complained of, which was built up to the street. That her rights are not affected by the fact that others had encroached upon the building line. In the case of Morrow v. Hasselman (N. J.), 61 Atl. Rep. 369, the tract of land subdivided comprised several streets and avenues. Complainant alleged that a bay window in defendant's house extended 2½ feet over the building line and that the porch also projected over the building line, thereby obstructing complainant's view. Defendant set up various breaches of the restrictions on other of the streets and avenues. The court says: "Complainant's view to the east is specially affected by these violations, and she has a special interest and right in preventing the obstruction to her view. * * * As to alleged violations on other streets and avenues * * * they are not material in this case, as the restrictions on each avenue must be considered as adopted with special reference to each avenue and its improvement, and the rights of purchasers on one avenue are not impaired or affected by acts of the vendor or other purchasers relating to the then existing restrictions on other avenues." Thus, in 11 Cyc. 1137: "The complainant's right to enforce such covenant is not affected by acquiescence in the violation of another covenant, nor by another lot owner's violation of a like covenant, so long as the covenant is of any value to him," citing authorities. Most of the cases on this subject where other violations have occurred turn on whether or not the covenant is of value to complainant, or its violation an injury to him. In Rowland v. Miller (N. Y.), 34 N. E. Rep, 765, the lots were sold under a restriction to residence purposes. The character of the neighborhood changed to such an extent that most of the property was used for various business purposes. Plaintiff, however, continued to reside in her property. An undertaking establishment was set up next door, against which the suit was directed. The court says, in distinguishing the case from Trustees v. Thatcher, 87 N. Y. 311: "The principles of that case (Trustees v. Thatcher) are not applicable to the facts of this. There it appeared that the contract which plaintiff sought to enforce was no longer of any value to it, and that its enforcement would result in great damage to the defendant, without any benefit to anyone. Here the plaintiff has a right to occupy her house as a residence, and in such occupation to have the protection of the restriction agreement. She has never violated the agreement herself, or consented to, or authorized or encouraged, its violation by others. In order to have the benefit of the agreement she is not obliged to sue all its violators at once. She may proceed against them seriatum, or she may take no notice of the violations of the agreement by business carried on remotely from her residence, and enforce it against a business specially offensive to her by its proximity. This is not a case where the defendants can ask for immunity in an equitable forum because others are, in a greater or less degree, also violators of the agreement." We must conclude from the tenor of this and other decisions that where a party continues the use of his property as originally intended, even though the character of the neighborhood has changed, he would still have the right to enjoin a use of the adjoining premises in a manner peculiarly objectionable to him, as well as injurious. See 35 Cent. L. J., 184; 43 Cent. L. J. 170.

JETSAM AND FLOTSAM.

SNYDER ON MINES v. LINDLEY ON MINES.

The above is the heading of a very interesting circular published recently by the law book firm of T. H. Flood & Company of Chicago, recounting the story of the copyright infringement suit over the publication of Snyder on Mines, Mr. C. H. Lindley complaining that said work infringed his own well known treatise on the same subject. Shortly after the work of Mr. Snyder was published, Mr. Lindley, so this circular informs us, sought to enjoin the publication of Snyder on Mines, alleging an infringement of copyright. The court refused a preliminary injunction and referred the cause to a master to take the evidence and to make the findings of fact as to the claimed piracy. This evidence was taken by the master and upon it he made full and exhaustive findings. His general conclusion was contained in the recommendation "that the prayer of the bill of complaint be denied and that said bill be dismissed, at the complainant's costs for want of equity."

Some of the findings of the master, as related by this circular, are very interesting, and show a very painstaking review of the two books.

Thus, in regard to a quotation from Black v. Elkhorn Mining Co., 163 U. S. 443, the master finds: "That Lindley's quotation is incorrect in that he has omitted, without indicating the omission, after the word 'terminate,' the following phrase appearing in the original opinion, viz: 'And it appears to be equally plain that if he actually abandoned the possession, giving up all claim to it, and left the land, all the right provided by the statute would terminate.' Snyder, in his quotation has inserted this phrase."

So also, in regard to railroad grants remaining floats until the line of the road is definitely fixed by filing the map of definite location, the master finds that "Snyder cites three cases that are not given by Lindley." "Lindley states that in the 500,000 acre grant and the school section grants the law was silent as to reservation of minerals; Snyder says that in the 500,000 acre grants minerals are expressly excluded, citing the volume of statues where the act is to be found. Both authors refer to the settled policy of the government to reserve mineral lands, and Snyder gives citation to the provisions of the R. S. U. S. thereon, which is not in Lindley. Snyder also gives a fifteen-line excerpt (not found in Lindley) from a land office circular of instructions, emphasizing this policy."

So also, in regard to tunnel claims, the master finds: "Each author is defining the meaning of the 'line of the tunnel.' Snyder states the doctrine of the Supreme Court of the United States, which is not given by Lindley; he also discusses the conflicting holdings of the courts, some maintaining that the line of the tunnel means a block of ground fifteen hundred feet by three thousand feet; others holding that it is merely the bore of the tunnel itself; which conflict is not noted by Lindley."

So also, in regard to the time after discovery given the locator to complete his location, the master finds that Snyder "states the contrary doctrine of Patterson v. Tarbell, 26 Ore. 29, that in the absence of local rule or statute, the law gives no time in which to complete a location; which doctrine is not referred to by Lindley."

Many other points of difference are found by the master, which but go to show the fact that

they are so few that legal authors covering the same general subject of law must necessarily very often step into each other's tracks. Consulting exactly the same authorities, the same statutes and indeed the same sources in every respect for their information, it is strange that any very distinct differences should be detected between the works of two capable men on the same subject. Of course no two men will state their text alike in all respects, but since it has now become almost an unconscious habit on the part of many authors to state their text in the language of some court whose opinion strongly impressed them as the best statement of the law on some particular question, it will often happen that the text in many law books on the same subject will be apparently alike, especially where the wholesome and wholesale use of quotation marks is considerably neglected.

EXAMINATION FOR NATURALIZATION IN THE STATE OF WASHINGTON.

Very recently in the northwestern part of the state of Washington, a foreign born person, calling himself Col. Stark, applied to the judge of the superior court for naturalization papers. He had been in the United States for twenty years, most of which time had been spent in the State of Pennsylvania. A United States representative appeared in court to cross-examine the applicant for citizenship, for the purpose of testing his qualifications and knowledge of American affairs, and among other things, asked the applicant who the President of the United States was at the present time. The applicant answered as follows:

Cleveland was when I came to the United States, and afterwards I worked in the steel plant in Pittsburg, Pa., and I think at that time either Mr. Carnegie or Schwab was president of the United States. I know Mr. Carnegie was president at one time, but I am not sure whether he is now or not. Mr. Schwab was president of the United States for a short time.

After declaring his love for American institutions, and his desire to become an American citizen, and his admiration for a country intelligent enough to elect such good men as Carnegie and Schwab to the position of presidency, the examining officer discharged him and called for one of his witnesses, who was sworn, and among other things was asked, if he thought Col. Stark was well enough qualified, and well enough acquainted with American institutions to make a good citizen, to which the witness said he thought he was, and then the examining officer propounded to the witness the following questions to test his knowledge of affairs.

Who makes the laws of the United States?

The answer was: President Roosevelt.

Who helps him? was the next question.

I never heard of anyone doing so, was the answer.

Who makes the laws of the State of Washington?

Governor Mead.

Who helps him?

Mr. F., who secured Gov. Mead his nomination is his political helper and may possibly make some of the laws. I think he does.

The judge took the case under advisement.

A COUNTRY JUSTICE.

Justice Hoopenheifer sustained the dignity of the law by imposing stiff fines upon the "drunks" and malefactors who came before him for trial. Having thus satisfied his conscience officially, he frequently proceeded to express his sympathy privately by paying from his own purse the fine he had imposed. He paid six fines for Jim Hand, the village drunkard. But, at the seventh, even the generosity of Justice Hoopenheifer halted. "This thing's got to end somewhere," he said to Sam, the constable. "Lock Jim up."

It is commonly believed that the justice did not sleep much that night. At all events, he besieged the constable's door at sun-up. The sleepy-eyed officer appeared, "What's wanted?" he yawned.

"Turn Jim Hand loose," shouted Hoopenheifer. "Turn him loose, quick! His fine is paid."

The parson, who had made the complaint in this case, heard of the incident and took the justice to task. "You should let the law take its course," said the parson. "You should make this man an example. He gets drunk and neglects his family. Let him pay the penalty. As he has sown, so let him reap."

"Parson," replied Justice Hoopenheifer, "where is Bill Hand wuth most—lyin' in jail, or out workin' to support his wife and babies? He'll git drunk ag'in? Yes, and he'll git sober ag'in. And between sprees he'll work. Every hour's work is a help to somebody. Every hour in jail is an hour lost to everybody. Punishment doesn't build up backbone, and loungin' in jail doesn't stimulate industry. Every man's best chance is out of jail. I've got this man out, and it's up to you and me and every decent citizen to keep him out. Leave the 'sixteenthly' off your next sermon and a few of the 'O, Lord, thou knowests' off some of your prayers, and go and see this man. Help me help him, and we'll fetch him out right yet. I've paid seven fines for him, and I may have to pay seven more, but he is the father of some boys and girls, and for his own sake, and for their sake, he's wuth givin' a boost. You make free to advise me about my business. Why, consarn ye, what do you know about your own business? Like as not you'll go to this Jim Hand and ta'k to him about hell and his soul. Don't do it. He knows more about the fust than you do, for he's been a-livin' in it. And, as to his soul, the only way to keep it from strayin' off, is to patch up the body its got to roost in. The best temperance talk is good nourishin' food. The powerfulest evangelists is light air and soap. Help me git these things to Jim Hand's house, and I reckon he can git along without extra prayers for quite a spell."

One day Ben Gildersleeve, a local legal light, was brow-beating a witness—a frail and nervous little woman. Justice Hoopenheifer rebuked Gildersleeve once or twice, but the brow-beating process was immediately resumed. Hoopenheifer calmly arose, walked over to Gildersleeve, knocked him down with a well directed blow, then adjourned court. While Gildersleeve was being gathered up and carried home, Hoopenheifer swore out a warrant before himself, against himself, plead guilty, and sentenced himself to ten days' imprisonment. Then he walked over to the jail and

had himself locked up. Regardless of the protests of the whole community, he stubbornly served his time. "When I deserve it, I'm a-goin' to take my own medicine, and nobody can't stop me," said Hoopenheifer.

The old fellow had been in office some months before he was called upon to officiate at a marriage. The request came unexpectedly. He was holding court one day, when Sam Slack, the constable, edged up and whispered: "Say, jedge, that big woman what jist come in wants you to marry her."

"Me?" exclaimed the justice. "Why, I'm married already."

"I misspoke myself," apologized Sam. "She wants you to splice her to a little bow-legged cuss that's hangin' around outside—dassn't come in."

"Dang such a man," growled Hoopenheifer. "I'll marry 'em jist to punish him." Then, in a loud tone, the justice announced: "This court will take a recess of five minutes. Bring in the stalwart bride and the blushin' groom."

The "happy pair" presented themselves—the bride, a six-foot Amazon; the groom, a timid pigmy, whose knees smote together. Hoopenheifer knew no wedding ceremony, therefore he was constrained to improvise.

"Jine left hands," he commanded. The parties obeyed. "Raise your right hands and be swore." Up went the hands, the groom's trembling. The justice continued impressively: "Do you solemnly swear that you will take each other for husband and wife, to the best of your knowledge, information and belief, so help you God? Yes? Then go your way and sin no more."

The brevity of this marriage ceremony led some good people to poke fun at it—especially the parson, who saw in Hoopenheifer a possible competitor. The justice said little, but diligently prepared for the future. He resorted to his library—a single book of obsolete forms—and from the framework of wills, deeds, bills of sale and other legal rubbish, enriched by his own invention, prepared a marriage service that he afterwards invariably used. It was as follows:

"In the name of God, amen. This couple being of sound and disposing mind and memory, do hereby make, publish and declare their will as follows: that they hereby grant and convey themselves, each to the other, as man and wife, to have and to hold forever; hereby covenanting and warranting, each unto the other, that, at the date hereof, they are not subject to any prior incumbrances whatsoever. Am I right?' (Upon being assured, he would proceed.) "Then, in the name of the people of the State of Michigan, and pursuant to the statute in such case made and provided, I pronounce you wed. If anyone has objections, let him state them now—for it's too late."

BOOK REVIEWS.

Bolles' Law of Banking.

This is a clear and concise statement of the law of banking in its present state of development. The work is complete in two volumes. It is comprehensive in its scope, treating of the organization and management, as well as the rights, duties, obligations and liabilities of a bank, and its relation to its stockholders, officers, depositors and others. Authorities are cited in support of the text, or showing the contrary view. The work will be of great value to the busy lawyer. The excellent index renders very accessible the subjects treated. Besides a table of cases, there is included a statement of the provisions of the national banking act. The book is by Albert S. Bolles, Ph. D., LL. D. Published by The George T. Bisel Company, Philadelphia, Pa.

BOOKS RECEIVED.

Notes on the Law of Wills and the Administration of the Estates of Deceased Persons. By William Patterson Borland, of the Kansas City Bar. Dean of the Kansas City School of Law, Kansas City, Mo.: Vernon Law Book Company, 1907. Buckram. Price, $3.50. Review will follow.

Federal Usurpation. By Franklin Pierce, of the New York Bar. Author of "The Tariff and the Trusts." New York. D. Appleton & Company. 1908. Cloth. Price $1.50. Review will follow.

HUMOR OF THE LAW.

Chief Baron O'Grady was, for instance, a humorist of the first water, as the following stories will prove. One day a brother judge, who owed his promotion rather to interest than to brains, was boasting to O'Grady of the summary way in which he disposed of matters in his court.

"I say to the fellows who are bothering me with foolish arguments that there's no use in wasting my time and their breath, for that all their talk only just goes in at one ear and out at the other."

"And no wonder," quietly answered O'Grady, "seeing that there's so little in between to stop it!"

An ingenious marriage contract not to be performed until the death of the young lady's mother, presumably to avoid any disagreeable interference by the mother-in-law with the connubial bliss of the wedded pair, is revealed in the case of Bailey v. Brown, 88 Pac. Rep. 518. Judge McLaughlin, of the California court of appeals, who filed a concurring opinion in the case, intimates that a breach of such contract did not constitute a cause of action. He asked the question, "How could a contract to marry exist when the promisor might never be under an obligation to marry the promisee, and vice versa?" and continued: "If this good mother should live to a very ripe old age, as mothers sometimes do, no human could tell what might happen. Either of the parties might be waiting for the other, harp in hand, beyond this vale of tears, or both might pine away and die before this promise of future connubial bliss could ripen into a cause of action enforceable in earthly courts."

Sir Joseph Jekyll was a born wit, of whom many amusing stories are told. Once when an attorney called Else, of small stature and poor reputation, addressed him thus in court: "My lord, I understand that you have called me a pettifogging scoundrel. Is that so?"

"Sir," answered Jekyll sternly, "I am not aware that I have ever called you a scoundrel or a pettifogger, but I may have said that you are little Else."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Accord and Satisfaction**—Unexecuted Agreement.—An agreement by a broker to accept less than the amount of his commissions held not to operate as an accord and satisfaction unless actually executed.—Phinizy v. Bush Ga., 59 S. E. Rep. 259.

2. **Acknowledgment**—Validity.—A mortgage held entitled to record though acknowledged before the cashier of the bank of which the mortgagee was president.—Kee v. Ewing, Okla., 87 Pac. Rep. 297.

3. **Adverse Possession**—Notorious Possession. —Where the use is not secret, but open, visible, and notorious, the presumption of knowledge follows.—Gurnsey v. Antelope Creek & Red Bluff Water Co., Cal., 92 Pac. Rep. 326.

4.——Occupancy for 20 Years.—A tenant having set up a claim by adverse possession where the evidence fails to show occupation for any continuous period of 20 years, a judgment for demandant is required.—Proctor v. Maine Cent. R. Co., Me., 64 Atl. Rep. 839.

5. **Aliens**—Chinese Deportation Proceedings. —Where defendants, in Chinese deportation proceedings, were before the commissioner and before the court, objections to the validity of the process of arrest were not available to oust the court of jurisdiction.—Toy Tong v. United States, U. S. C. C. of App., Third Circuit, 146 Fed. Rep. 343.

6. **Appeal and Error**—Assignment of Errors. —To give the appellate court jurisdiction, the assignment of errors must contain the full names of all the parties to the judgment appealed from, unless the apeal is a perfected term time appeal.—Kellogg v. Ridgely, Ind., 81 N. E. Rep. 1158.

7.——Finality of Decree.—Where the trial judge rendered a decree capable of a construction either as final or not final, and treated it in subsequent proceedings as final, his construction will be adopted on appeal.—G. S. Baxter & Co. v. Camp, Ga., 59 S. E. Rep. 283.

8.——Motion to Increase.—Where the judgment is in whole or in part other than a money judgment, the amount and condition of a supersedeas bond must be determined by the court below, and its action will be held conclusive.—Hatchcock v. Societe Anonyme La Floridienne, Fla., 45 So. Rep. 22.

9.——Record.—Where exception is taken to refusal to allow an amendment to pleadings, the amendment should be set out in the bill of exceptions or attached as an exhibit.—Thomas & McCafferty v. Siesel Ga., 58 S. E. Rep. 113.

10.——Scurrilous Brief.—Where counsel files a brief containing unwarranted reflections upon the trial judge, he may be compelled to expunge the objectionable matter, and be barred from further appearance in the case until he does so.—Christensen v. Floriston Pulp & Paper Co., Nev., 92 Pac. Rep. 210.

11.——Waiver of Error.—Both parties having induced the court to charge in accordance with the facts proved, neither could complain that such facts were not within the pleadings.—Donk Bros. Coal & Coke Co. v. Stoetter, Ill., 82 N. E. Rep. 250.

12. **Arrest**—Rearrest After Release on Bail. —To authorize a rearrest for the same offense when defendant was at large on his own recognizance, a forfeiture must be declared and another warrant issued.—Sherman v. State, Ga., 58 S. E. Rep. 1122.

13. **Assault and Battery**—Abusive Language. —The aggressor in the use of opprobrious words cannot set up as a defense to a violent battery with a pistol the use of similar words provoked by his own language.—Sutton v. State, Ga., 58 S. E. Rep. 1108.

14. **Attorney and Client**—Authority of Attorney.—Where a purchaser employed an attorney to give an opinion as to the title, the purchaser was not bound by the opinion, nor by the attorney's agreement that projections of an adjoining property owner's building could remain a year for $5 paid to the attorney.—Walters v. Mitchell, Cal., 92 Pac. Rep. 315.

15. **Bankruptcy**—Accounting from Creditor.— Trustees in bankruptcy held entitled to an accounting from a creditor holding two securities for his debt who has failed to realize enough on one of them to discharge the liability.—Smith v. Godwin, N. C., 58 S. E. Rep. 1089.

16.——Acts of Bankruptcy.—Where, on the death of a member of an insolvent firm and the making of an inventory of its assets and liabilities, as provided by Rev. St. Ohio 1906, secs. 3167, 3169, the surviving partner elected not to take the interest of the deceased partner, but joined the administrator in an application for the appointment of a receiver, his act in so doing did not constitute an act of bankruptcy on his part.—Moss Nat. Bank v. Arend, U. S. C. C. of App., Sixth Circuit, 146 Fed. Rep. 351.

17.——Claim Against Bankrupt.—A claim against a bankrupt's property valid against a

bankrupt will be upheld against his trustee unless contrary to some express provision of the bankrupt act, public policy, or established legal principle.—Godwin v. Murchison Nat. Bank, N. C., 59 S. E. Rep. 154.

18.——Election of Trustee.—The election of a trustee approved by the referee, confirmed as against objections that it was brought about by a conspiracy between certain persons to obtain control of the property.—In re Ketterer Mfg. Co., U. S. D. C., M. D. Pa., 155 Fed. Rep. 987.

19.——Garnishment.—Property disclosed on a garnishment in a suit for libel or the liability on a dissolving bond held not affected by the bankruptcy of the defendant more than four months after garnishment.—National Surety Co. v. Medlock, Ga., 58 S. E. Rep. 1131.

20.——Preferences.—That a bankrupt's trustee may set aside an alleged fraudulent preference, it is necessary to prove at least that the transferee had knowledge of some fact or facts which would lead a reasonably prudent man to inquire, and that the inquiry would have been to disclose the debtor's insolvency.—Andrews v. Kellogg, Colo., 92 Pac. Rep. 222.

21.——Refusal to Answer Questions.—The fact that the refusal of a bankrupt to answer material questions in the course of the proceedings which were approved by the referee was based on the claim of his constitutional privilege not to incriminate himself does not deprive the court of the right to deny him a discharge because of such refusal.—In re Dresser U. S. C. C. of App., Second Circuit, 146 Fed. Rep. 383.

22.——Waiver of Exemption.—Where by adjudication in bankruptcy a creditor cannot sue the debtor who was estopped by waiver to claim an exemption as against the creditor, the latter's remedy is in equity.—Perry v. Britt-Carson Shoe Co., Ga., 59 S. E. Rep. 216.

23. **Bastards**—Legitimatizing Statutes.—The state has the power to prescribe that children born out of lawful marriage may under certain conditions become legitimate.—Houghton v. Dickinson, Mass., 82 N. E. Rep. 481.

24. **Bills and Notes**—Bona Fide Purchaser.—Where fraud in the inception of a note is shown, the burden is on indorsee to show that he is an innocent holder, but the burden is discharged where he shows that he purchased for value in the usual course of the business.—Meyer v. Lovdal, Cal., 92 Pac. Rep. 322.

26.——Plea Non Est Factum.—To entitle plaintiff to recover on an issue of non est factum, he must prove either that defendant signed the note, or that his name was signed by some authorized person, or that he subsequently ratified the same.—Ritchie County Bank v. Bee, W. Va., 59 S. E. Rep. 181.

26.——Renewal Notes.—One giving a renewal note having knowledge of partial failure of consideration for the original, or who by ordinary diligence could have discovered the same, held bound by the renewal note.—Padgett v. Lewis, Fla., 45 So. Rep. 29.

27. **Brokers**—Compensation.—Where a broker's duty is not merely to procure a purchaser, but to perform some other agreed services, the general rule as to what is required of him to be entitled to a commission is modified accordingly.—Phinizy v. Bush, Ga., 59 S. E. Rep. 259.

28. **Cancellation of Instruments**—Mistake of Fact.—Equity will rescind an agreement on the ground that a party entered into it through a mistake of facts material thereto, when the same can be done without injustice to the adverse party.—Morgan v. Owens, Ill., 81 N. E. Rep. 1135.

29. **Carriers** — Independent Contractor. — A traction company contracting to clean and repair cars of a street railway company held an independent contractor and liable for the negligence of its workmen.—Beckman v. Meadville & C. S. St. Ry. Co., Pa., 67 Atl. Rep. 983.

30.——Limiting Liability for Lost Baggage.—A ticket limiting the carrier's liability for loss of baggage does not limit its liability, where the passenger does not know of the stipulation.—Martin v. Central R. Co. of New Jersey, 106 N. Y. Supp. 226.

31.——Res Ipsa Loquitur.—Where a passenger was injured in a collision, defendant having admitted the collision and failed to show the cause, the passenger was entitled to recover under the doctrine "res ipsa loquitur."—Russell v. Seattle, R. & S. Ry. Co., Wash., 92 Pac. Rep. 288.

32. **Clerks of Courts**—De Facto Officer.—The office of deputy superior court clerk may be filled by an officer de facto who was not clerk

33. **Commerce**—Interstate Municipal Regulations.—A city ordinance prohibiting the distribution of hand bills or circulars on the streets held not an interference with interstate commerce as against a concern doing business in another state and desiring to distribute circulars advertising such business.—International Text Book Co. v. Inhabitants of City of Auburn, U. S. C. C., D. Maine, 155 Fed. Rep. 986.

34. **Constitutional Law**—Constitutionality of State Law.—The unconstitutionality of state legislation may be manifested either on its face in its express provisions or in the manner of enforcing and carrying it into effect.—Douglas Park Jockey Club v. Grainger, U. S. C. C., W. D. Ky. 146 Fed. Rep. 414.

35.——Delegation of Legislative Power.—The rule that the legislature cannot delegate its power to make laws does not affect a law which is to take effect only on the happening of some contingency, or on the action of some public agency.—Rouse v. Thompson, Ill., 81 N. E. Rep. 1109.

36.——Improvement of Highways.—Act March 7, 1905 (Acts 1905, pp. 493-496, c. 164; Burns' Ann. St. Sup. 1905, secs. 6816-6822), relating to improvement of highways, held not violative of Const. U. S. Amend. 14 as depriving of property without due process of law.—State v. Board of Com'rs of Marion County, Ind., 82 N. E. Rep. 482.

37. **Contracts**—Illegality.—A contract for the construction of certain buildings for a corporation held tainted with illegality and fraud, precluding a recovery thereon, either for the contract price or the amount originally bid for the work.—Standard Lumber Co. v. Butler Ice Co., U. S. C. C. of App., Third Circuit, 146 Fed. Rep. 359.

38. **Corporations**—Limit of Corporate Existence.—That a corporation's life was limited to a specified period would not necessarily affect its rights to acquire property, in the enjoyment of which its successors and assigns would be protected.—In re Consolidated Gas Co., of New York, 106 N. Y. Supp. 407.

39. **Courts**—Construction of Statutes.—The construction of statutes of the state by the supreme court, unless clearly erroneous, should be followed by a justice sitting at special term,

rather than the decision of a federal circuit court of similar jurisdiction.—In re Interborough Metropolitan Co., 106 N. Y. Supp., 416.

40. **Covenants**—Action for Breach.—Possession under a written lease and a holdover agreement on the same terms held tantamount to an eviction and to constitute a breach of the covenant of warranty of title to the premises.—Fortescue v. Columbia Real Estate Co., N. J., 67 Atl. Rep. 1024.

41.——Breach.—A grantee having conveyed the property to another, and thus disabled himself from reconveying to his grantor, held not entitled to recover on the grantor's covenant of seisin.—Eames v. Armstrong, N. C., 59 S. E. Rep. 165.

42.——Running with Land.—A covenant imposing a burden will run with the land as readily as one conferring a benefit, where there is the requisite privity of estate, and the covenant is connected with or concerns the land conveyed.—Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co., Colo., 92 Pac. Rep. 290.

43. **Criminal Law**—Instructions.—The controlling issue in a criminal case must be submitted by such appropriate instructions calling the jury's attention to the issue and charging the specific principles of law applicable without specific requests.—Glaze v. State, Ga., 58 S. E. Rep. 1126.

44. **Criminal Trial**—Argument of Counsel.—Where defendant's only defense relies on discrediting the testimony against him, his counsel can discuss the motive of a witness, under indictment for the same offense, who has turned state's evidence.—Parker v. State, Ga., 59 S. E. Rep. 204.

45.——Disorderly Conduct Under City Ordinance.—In a prosecution for disorderly conduct under a city ordinance, if there was no such ordinance, the burden was on defendant to show the fact.—Fountain v. City of Fitzgerald, Ga., 58 S. E. Rep. 1129.

46.——Disqualification of Jurors.—Jurors on a trial for murder having stated that they believed defendant was guilty, and if on the jury would hang him, held, that a new trial must be granted.—Sasser v. State, Ga., 59 S. E. Rep. 255.

47.——Instructions as to Circumstantial Evidence.—Where the conviction depended entirely on circumstantial evidence, the court should have charged that the proof must exclude every reasonable hypothesis except guilt.—Harwell v. State, Ga., 58 S. E. Rep. 1111.

48.——Misconduct of Jurors.—It is improper for jurors to read newspaper editorials tending to influence their minds and to destroy their perfect freedom from bias or prejudice.—Styles v. State, Ga., 59 S. E. Rep. 249.

49.——Motion in Arrest of Judgment.—Where on an indictment containing more than one count, defendant waives his right to attack a defective count, the judgment finding him guilty will not be arrested on motion.—Sessions v. State, Ga., 59 S. E. Rep. 196.

50.——Separation of Jury.—Where both accused on trial for misdemeanor and his counsel knew that two of the jurors had been temporarily separated from the jury, but failed to object thereto until after verdict, the objection was waived.—Waller v. State, Ga., 58 S. E. Rep. 1106.

51. **Damages**—Lex Loci.—Courts will enforce a cause of action for death by wrongful act growing out of the laws of another state unless the laws are contrary to the public policy of the state of the forum.—Christensen v. Floriston Pulp & Paper Co., Nev., 92 Pac. Rep. 210.

52. **Deeds**—Construction.—Where the granting clause of a deed enumerates the grantors and is signed by them and another, the deed is only that of the grantors named.—Dinkins v. Latham, Ala., 45 So. Rep. 60.

53.——Mistake in Designation of Grantee.—A mistake in the name of the grantee in a deed cannot be corrected by a subsequent deed by the grantor to the alleged intended grantee, reciting that it was made to correct error in the name of the original grantee.—Walters v. Mitchell, Cal., 92 Pac. Rep. 315.

54. **Divorce**—Community Property.—In an action for divorce or maintenance, a wife may pursue property transferred by her husband to defeat or defraud her of her right to alimony or a division of the community property.—Duncan v. Duncan, Cal., 92 Pac. Rep. 310.

55.——Objections Not Raised in Trial Court.—On the objection that a complaint in divorce is defective, as not alleging the required residence, in the state, raised for the first time on appeal, no costs will be allowed.—Ramsdell v. Ramsdell, Wash., 92 Pac. Rep. 278.

56. **Elections**—Marking Ballots.—Fact that ballots were so heavily marked with a hard pencil as to make the imprint visible from the back of the ballot held not to render them void as bearing distinguishing marks.—Winn v. Blackman, Ill., 82 N. E. Rep. 215.

57. **Eminent Domain**—Compensation.—Where defendant in condemnation proceeedings takes the position that petitioner has no right to condemn, the question of inability to agree as to compensation for the property sought to be taken thereafter becomes immaterial.—State v. Superior Court of Chehalis County, Wash., 92 Pac. Rep. 269.

58.——Description of Property Taken.—A certain line used in the description of premises taken in condemnation proceedings held to be the line of an avenue as shown on the official map, and not the line established by fences constructed by occupants of lots not on the line of the avenue.—City of Petaluma v. White, Cal., 92 Pac. Rep. 177.

59.——Nature and Form of Proceeding.—A condemnation proceeding is a summary one, and the statute contemplates a speedy trial authorizing the proceedings to be carried on in vacation, as well as term time.—Moll v. Sanitary Dist. of Chicago, Ill., 81 N. E. Rep. 1147.

60.——Right of Telephone Company to Use of Street.—A telephone company holding a village franchise is not authorized to occupy streets, the title to which is in the abutting owner, without his consent and against his wishes without having acquired the right by condemnation proceedings.—Hudson River Telephone Co. v. Forrestal, 106 N. Y. Supp. 404.

61.——Taking Property Without Compensation.—A property owner may in general obtain an injunction to restrain a railroad company from taking land for railroad purposes without first making compensation without showing inadequacy of his remedy at law.—Nelson v. New Jersey Short Line R. Co., N. J., 67 Atl. Rep. 1032.

62. **Estoppel**—What Constitutes.—Before the

acts of one person can be successfully invoked as an estoppel by another, such other must have relied on and been prejudiced by the acts of which he complains.—Dent v. Smith, Kan., 92 Pac. Rep. 307.

63. **Evidence**—Documents.—On the death of plaintiff his personal diary was brought into court by subpoena at the instance of defendant. Held, that where there was no averment that there was anything in the diary pertinent to the issue it would not be admitted.—Dorris v. Morrisdale Coal Co., Pa., 64 Atl. Rep. 855.

64.——Negligence.—On an issue as to defendant's negligence in failing to guard the cutter heads of a machine discussions between defendant's foreman and a deputy factory inspector as to the necessity and propriety of guarding the heads held incompetent.—Adams v. Peterman Mfg. Co., Wash., 92 Pac. Rep. 339.

65.——Res Gestae.—The declaration of a servant not within the scope of his employment held admissible against his employer only when it constitutes a part of the res gestae.—Conklin v. Consolidated Ry. Co., Mass., 82 N. E. Rep. 23.

66.——Self-Serving Declarations.—The opinions of physicians as to a person's condition, based upon statements made by him while they were examining him to discover the extent of his injuries, but not for treatment, are inadmissible as based upon self-serving declarations.—Chicago Union Traction Co. v. Giese, Ill., 82 N. E. Rep. 232.

67. **Executors and Administrators**—Estoppel.—The administrator of the mortgagor in a deed of trust held estopped to claim that the mortgagee had lost his right because not making sale immediately after maturing all the debt for default in payment of part of it when due.—Caldwell v. Kimbrough, Miss., 45 So. Rep. 7.

68. **Exemptions**—Bankruptcy.—A waiver of homestead and exemption in a note signed by one partner in the firm name is effectual against the separate property of the partner signing the note.—Perry v. Britt-Carson Shoe Co., Ga., 59 S. E. Rep. 216.

69. **Fixtures**—Machinery.—In cotton and woolen mills all machinery actually affixed to the freehold, though only by screws, or bolts, or connected with it by belts or bands, passes with the realty.—Equitable Guarantee & Trust Co. v. Knowles, Del., 67 Atl. Rep. 961.

70. **Forgery**—Indictment.—Where a forged paper is such that without the existence of extrinsic facts no apparent legal liability is created thereby, the indictment must aver such facts as will disclose its capacity to deceive and defraud, and enable the court judicially to see its tendency.—State v. Floyd, Ind., 81 N. E. Rep. 1153.

71. **Gas**—Authority to Lay Pipes.—An ordinance authorizing a gas company to transmit gas to other municipalities is not bad because not limiting the right to those municipalities in which the gas company has lawful authority to lay pipes.—Millville Imp. Co. v. Pitman, Glassboro & Clayton Gas Co., N. J., 67 Atl. Rep. 1005.

72. **Habeas Corpus**—Right to Discharge.—The right of accused to a discharge because four terms had intervened after his original mistrial without his being again brought to trial will not be determined by the supreme court in an intermediate proceeding.—People v. Strassheim, Ill., 81 N. E. Rep. 1129.

73.——Want of Jurisdiction.—One improperly sentenced on a verdict sufficient as a verdict for assault and battery will be remanded to the court for sentence as for assault and battery.—Ex parte Burden, Miss., 45 So. Rep. 1.

74. **Highways**—Right of Abutting Owners.—The owner of land through which a highway passes has a right to make any reasonable use of it which does not interfere with the enjoyment of the public easement.—King v. Norcross, Mass., 82 N. E. Rep. 17.

75. **Homicide**—Evidence.—A visit of decedent's widow to the office of defendant's counsel after the homicide held not admissible against defendant to show that decedent's widow was in sympathy with defendant, or that she had with him, prior to the homicide, illicit relations.—Sasser v. State, Ga., 59 S. E. Rep. 255.

76. **Husband and Wife**—Joint Conveyance.—Where land is conveyed to husband and wife jointly, and judgment is entered against the husband, the wife, after the death of the husband, takes the land free from judgment.—Hetzel v. Lincoln, Pa., 64 Atl. Rep. 866.

77. **Indictment and Information**—Issues and Proof.—It is not sufficient to sustain a conviction on a particular charge to prove that defendant was guilty of some other charge, or general bad conduct, but the proof must establish his guilt of the particular charge set forth in the indictment.—Lowell v. People, Ill., 82 N. E. Rep. 226.

78. **Injunction**—Construction of Decree.—A directed verdict enjoining defendant from tearing up, removing, or otherwise abandoning a section of road held not to require defendant to replace a portion of the road already torn up.—Atlantic & B. Ry. Co. v. Brown, Ga., 59 S. E. Rep. 278.

79. **Intoxicating Liquors**—Wrongful Sale.—Where a witness purchased a liquid sold to him as whiskey, it was immaterial, in a prosecution for selling intoxicating liquor illegally that the witness did not drink any of the whiskey.—Tompkins v. State, Ga., 58 S. E. Rep. 1111.

80. **Judges**—Death of Judge Presiding at Trial.—In case of the death of a federal judge who presided at the trial of a criminal case after a verdict of conviction, but before sentence, his successor may impose sentence on the defendant where the record contains sufficient to guide his discretion.—United States v. Meldrum, U. S. D. C., D. Oreg., 156 Fed. Rep. 390.

81. **Judgment**—Equitable Relief.—A judgment will not be set aside because prevailing party practiced fraud on the court and the adverse party by concealing the evidence of his fraud, where the particular fraud was the issue on trial and there adjudicated.—Thomason v. Thompson, Ga., 59 S. E. Rep. 236.

82.——Questions Determined.—Where, in a suit for violation of a contract, the court gives judgment on some items, but dismisses the claim as to others, as in case of nonsuit, there can be a defense in a second suit on the items with respect to which the judgment of nonsuit was rendered.—Amos Kent Lumber & Brick Co. v. Payne & Jouber, La., 44 So. Rep. 728.

83.——Res Judicata.—A judgment in an action to quiet title held not res judicata in a subsequent action to quiet title.—Bird v. Winyer, Wash., 87 Pac. Rep. 259.

84. **Judicial Sales**—Purchase by Attorney.—Title of an attorney to land purchased at judi-

cial sale in proceedings in which he so acted falls with the reversal of a decree directing the sale.—Johnson v. McKinnon, Fla., 45 So. Rep. 23.

85. **Jury**—Disqualification.—It was no ground for challenge to the array that 12 of the 48 jurors had just served in the trial of another jointly indicted with defendant; such ground of challenge being available only to the poll.—Paulk v. State, Ga., 58 S. E. Rep. 1109.

86. **Landlord and Tenant**—Improvements by Tenant.—The right of a tenant to receive payment from the landlord for improvements placed on the premises arises from express contract only.—Diedrich v. Rose, Ill., 81 N. E. Rep. 1140.

87.——Relationship.—The relation of landlord and tenant exists where one person occupies the land of another in subordination to the other's title, and with his consent, express or implied.—Hawkins v. Tanner, Ga., 59 S. E. Rep. 225.

88. **Larceny**—Instructions.—Where in a prosecution for hog theft defendant claimed that he intended only to wound and kill it, it was error to refuse to charge that, if such defense was made out, defendant was not guilty.—Paulk v. State, Ga., 58 S. E. Rep. 1108.

89. **Life Estates**—Rights of Life Tenant.—Where a widow took a life estate charged with a legacy to her son, and made various payments to the son, of which she kept no account, she could not charge such payments against the estate at the expense of the remaindermen.—Vanatta v. Carr, Ill., 82 N. E. Rep. 267.

90.——Transfer of Rent Notes.—Where a life tenant, who was also executor and trustee, rented the land, he could transfer the rent notes, and the rights of the transferee would be superior to that of the remainderman after the death of the life tenant.—Hines v. McCombs, Ga., 58 S. E. Rep. 1124.

91. **Life Insurance**—Discrimination.—An insurance policy providing that in consideration of the policy holder giving information as to insurance agents and risks an annual income based on 1 per cent of the amount of cash premiums taken in by the company in any one year would be given such policy holder operates as an illegal discrimination, and is violative of Code, 1906, sec. 2600.—Cole v. State, Miss., 45 So. Rep. 11.

92. **Limitation of Actions**—Effect of Amending Petition.—If a suit is brought in time, and the declaration imperfectly states a cause of action, subsequent amendments, though filed after limitations has run, will not be barred if they state the same cause of action in a different form.—George B. Swift Co. v. Gaylord, Ill., 82 N. E. Rep. 299.

93. **Mandamus**—Limitations.—Where a judgment creditor fails to have execution issued in five years on a judgment against a city of the first class, and also fails to revive such judgment within one year after dormancy, it is barred by limitations.—Beadles v. Smyser, Okl., 87 Pac. Rep. 292.

94.——Municipal Board.—Mandamus to require a municipal body to perform a purely ministerial statutory duty may issue on the application of a resident taxpayer of the municipal district.—Lay v. Common Council of City of Hoboken, N. J., 67 Atl. Rep. 1024.

95.——Necessary Parties.—In a mandamus proceeding to compel the county superintendent of schools to sign a township treasurer's bond, the former treasurer is not a necessary party, since his right to the office is not involved.—Hertel v. Boismenue, Ill., 82 N. E. Rep. 298.

96.——When Writ Denied.—Writ of mandamus may be refused where its granting would decide questions of importance between persons not parties to the proceeding.—Smith v. Hodgson, Ga., 59 S. E. Rep. 272.

97. **Master and Servant**—Dangerous Premises.—Where blasting was a daily occurrence in a coal mine, the law would impute to the mining boss and to the mine operator knowledge that the effect of the blasting was to loosen material overhead in the rooms where the miners were.—Antioch Coal Co. v. Rockey, Ind., 82 N. E. Rep. 76.

98.——Fellow Servants.—Where the master has conferred upon a member of a class of workmen carrying on a particular branch of his business authority to control or direct the movements of men under his charge, while in the exercise of such authority the relation of fellow servants does not exist.—East St. Louis Connecting Ry. Co. v. Meeker, Ill., 82 N. E. Rep. 202.

99.——Fellow Servants.—The delegation of the duty of furnishing safe machinery to a coemployee will not defeat an action for negligence by an employee.—Kane v. Babcock & Wilcox Co., N. J., 67 Atl. Rep. 1014.

100.——Injury to Employee.—A planing mill company held not free from liability for injury to an employee caused by an unguarded saw because it had furnished a proper safeguard, and he failed to adjust it, where it is not shown to have been his duty to adjust it.—Johnson v. Far West Lumber Co., Wash., 92 Pac. Rep. 274.

101.——Injury to Minor Servant.—Proof that a boy under 16 years of age was put to work on or about a dangerous machine is evidence of the employer's negligence.—Schmidt v. Printing Business of Edwin C. Bruen, 106 N. Y. Supp. 443.

102.——Risks Assumed.—A servant undertakes the risks of his employment so far as they spring from defects incident to the service, but he does not risk the negligence of the master himself.—McCabe & Steen Const. Co. v. Wilson, Okl., 87 Pac. Rep. 320.

103. **Mechanics' Liens**—Work on District Buildings.—Where work done on a barn was merely incidental to work done on the house on the same premises, a mechanic's lien including both was not objectionable as including work on two distinct buildings.—Stephens v. Duffy, Ind., 81 N. E. Rep. 1154.

104. **Mines and Minerals**—Effect of Deed.—Where the owner of a placer claim located a lode claim, which conflicted with the placer, and thereafter deeded a part of the lode claim, the deed conveyed such portion of the placer as was within the part of the lode claim conveyed.—Collins v. McKay, Mont., 92 Pac. Rep. 295.

105.——Leases.—Where a lease was executed for coal mining for one year and as long as the lessee may continue to mine it, the mining to begin the next day, and after two years no mining had been done, equity will cancel the lease.—Starn v. Hoffman, W. Va., 59 S. E. Rep. 179.

106.——Location. — While actual discovery need not precede location of a mining claim, an alleged locator, not having made a discovery nor retained possession, cannot retain the land

daries on the ground.—New England & Coalinga Oil Co. v. Congdon, Cal., 92 Pac. Rep. 180.

107. **Mortgages**—Power to Declare.—After the exercise of the power given the mortgagee in a deed of trust to mature the entire debt for default in payment of any of it when due, held it is too late for the debtor to tender the amount due up to the time of default.—Caldwell v. Kimbrough, Miss., 45 So. Rep. 7.

108.——Rights of Mortgagee in Possession.—A mortgagee or his grantee in possession should be allowed in his account the cost of all necessary repairs and reasonable expenses and for any permanent improvements erected with the consent of the mortgagor.—Gillett v. Romig, Okl., 87 Pac. Rep. 325.

109. **Municipal Corporations**—Civil Service.—Where, under the civil service law, the municipal civil service commission cannot refuse to certify a pay roll because an employee named therein examined and certified for a position is performing duties not appropriate to the position, the commission cannot make a rule to this effect.—People v. Williams, 106 N. Y. Supp. 459.

110.——Proceedings for Validation of City Bonds.—Where an intervener, in a proceeding for the validation of city bonds, interposes objections based on facts which do not appear in the pleadings, the burden is on him to prove the facts thus set up.—Spencer v. City of Clarkesville, Ga., 59 S. E. Rep. 274.

111.——Repeal of Ordinance.—It is within the power of a city council to repeal any ordinance passed by it where the repeal does not affect the contractual rights of the city, nor the rights of third parties or taxpayers.—City of Santa Barbara v. Davis, Cal., 92 Pac. Rep. 308.

112.——Street Improvement.—Under Ann. Code 1892, sec. 3012, it was immaterial to abutting owners, assessed for street improvement, whether the work was done by the city under the street commissioner, or let out by contract, so long as they were charged no more than the actual cost of the work.—Edwards House Co. v. City of Jackson, Miss., 45 So. Rep. 14.

113. **Navigable Waters**—Riparian Rights.—Under the common law, if the owner of land bounded by the shore upon tidewater make improvements upon or reclaim the shore adjoining his lands, the part of the shore so improved or reclaimed belongs to him, and cannot be granted by the state.—Heiney v. Nolan, N. J. 67 Atl. Rep. 1008.

114. **Negligence** — Dentists. — A complaint against a dentist for injuries caused by his negligently dropping a tooth down plaintiff's trachea into her lung held not demurrable for failure to show that defendant's negligence was the proximate cause of the injury.—McGehee v. Schiffman, Cal., 87 Pac. Rep. 290.

115.——Elements.—To constitute actionable negligence there must exist a duty of the person charged to protect the complaining party from injury, a failure to perform the duty, and an injury resulting from the failure.—Chicago Union Traction Co. v. Giese, Ill., 82 N. E. Rep. 232.

116.——Injury to Person on Track.—Contributory negligence to be a defense to an action for injuring a person by negligence after discovering his peril, must be the negligent act or omission of the injured party with knowledge of the then present and impending peril.—Southern Ry. Co. v. Stewart, Ala., 45 So. Rep. 51.

117. **Nuisance**—Places Near Highway.—The fact that a manufacturing plant was maintained in close proximity to the public highway would not make the establishment a nuisance, or its erection and operation per se negligent.—Fort Wayne Cooperage Co. v. Page, Ind., 82 N. E. Rep. 83.

118. **Pilots**—Penalties for Violation of Regulations.—A pilot's license, duly granted under the pilotage act, is property, and the board of pilot commissioners has no power to revoke, annul, forfeit, or suspend such license as a penalty for the breach of its rules.—Virden v. Board of Pilot Com'rs, Del., 67 Atl. Rep. 975.

119. **Principal and Agent**—Authority of Agent.—Where one accepts the benefit of a bond issued through the agent of a bonding company, as is estopped from questioning its authorization.—American Bonding Co. v. Loeb, Wash., 92 Pac. Rep. 282.

120. **Principal and Surety**—Action by Surety.—Where the liability of a surety becomes absolute, he may file a bill against the principal debtor, though the creditor had not demanded payment from him.—Craighead v. Schwartz, Pa., 67 Atl. Rep. 1003.

121. **Railroads**—Accident at Crossing.—It is a question for the jury whether or not passengers for hire riding in a public carriage about to cross a railroad track, are in the exercise of ordinary care.—Wood v. Maine Cent. R. Co. Me., 64 Atl. Rep. 833.

122.——Change of Grade.—Railroads cannot be compelled to elevate or depress their tracks laid at grade over streets unless because of some peculiarity the tracks have of becoming dangerous.—City of Newark v. Central R. Co. of New Jersey, N. J., 67 Atl. Rep. 1009.

123.——Contributory Negligence. — Where plaintiff in an automobile was traveling at about 15 miles an hour at the time of the collision, the speed did not constitute negligence, per se.—Record v. Pennsylvania R. Co., N. J., 67 Atl. Rep. 1040.

124.——Expulsion of Passengers.—Where a passenger, after being put off a train near a station, walks down the track three or four miles, and is struck by another train, negligence in expelling held not the proximate cause of the injury.—Seaboard Air Line Ry. v. Smith, Ga., 59 S. E. Rep. 199.

125.——Injuries to Person on Track.—A count of a complaint against a railway company for causing the death of plaintiff's intestate by negligence after discovering his peril held sufficient as against a demurrer.—Southern Ry. Co. v. Stewart, Ala., 45 So. Rep. 51.

126.——Use of Right of Way.—A railroad may make such reasonable changes in its tracks as may be necessary for the advantageous use of its property and its growing needs.—Townsend v. N. Y. Cent. & H. R. R. Co., 106 N. Y. Supp. 381.

127. **Removal of Causes**—Effect of Removal.—The removal of a cause does not preclude the defendant from challenging the jurisdiction of either the state or federal court over his person or from claiming exemption from being sued in a state other than that of his residence.—Davis v. Cleveland, C., C. & St. L. R. Co., U. S. C. C., N. D. Iowa, 146 Fed. Rep. 403.

128. **Sales**—Right to Reclaim Goods.—To authorize a seller to recover from the buyer the goods solds and delivered because of the fraud of the buyer, it must be shown that the buyer formed an intent not to pay for the goods at the

time they were received or prior thereto.—Ayers v. Farwell, Mass., 82 N. E. Rep. 35.

129. **Sheriffs and Constables**—Failure to Levy.—A sheriff held liable for failure to levy on growing crops under a fi. fa. because of an outstanding bill of sale to secure advances.—Hixon v. Callaway, Ga., 58 S. E. Rep. 1120.

130. **Specific Performance**—Effect of Prayer for.—A petition which contains a prayer for specific performance and general relief will not authorize the grant of any relief which is not germane to the prayer for specific performance.—White v. Sikes, Ga., 59 S. E. Rep. 228.

131. **Statutes**—Intention of Legislature.—The intent of the legislature constitutes the law and may be as effectually manifested by what is necessarily implied as by what is expressed, and where there are conflicting manifestations of the legislative will the last is controlling.—Great Northern R. Co. v. United States, U. S. C. C. of App., Eighth Circuit, 155 Fed. Rep. 945.

132. **Taxation**—Delinquent List.—A delinquent list of lands sold for taxes held not fatally defective because the dollars and cents were not indicated by figures purporting to state the amount charged against the property.—Chapman v. Zobelein, Cal., 92 Pac. Rep. 188.

133. **Telegraph and Telephones** — Duty to Public.—Duties of a telegraph company, being a public service company, to the general public who have occasion to transact business with it, declared.—Dunn v. Western Union Telegraph Co., Ga., 59 S. E. Rep. 189.

134. **Theaters and Shows**—Right of Admission.—The holder of a ticket of admission to a place of amusement is, on being refused admission, entitled to recover the amount paid therefor and necessary expenses incurred to attend.—People v. Flynn, N. Y., 82 N. E. Rep. 169.

135. **Trade-Marks and Trade Names**—Illegal Use.—Retiring partner held not deprived of right to use his own surname in connection with his new business, though such name was a portion of the trade-mark used by the old firm.—White v. Trowbridge, Pa., 64 Atl. Rep. 862.

136. **Trade Unions**—Strikes.—A strike of members of a labor union against an increase of labor without an increase of compensation or to improve the condition of its members as laborers, though not so announced at the time, is justifiable.—Searle Mfg. Co. v. Terry, 106 N. Y. Supp. 438.

137. **Trusts**—Distribution of Income.—Though the will directed the payment of the income of the trust fund yearly to testator's children, the trustee should pay to the guardian of the only child so much income as was necessary for maintenance and education.—Baker v. Fooks, Del., 67 Atl. Rep. 969.

138. **Vendor and Purchaser**—Duty to Take Title.—A purchaser was not required to accept title where projections on the house on the adjoining lot overreached the property in question a few inches, though the house owner agreed to remove them.—Walters v. Mitchell, Cal., 92 Pac. Rep. 315.

139. **Venue**—Non-Joinder of Unnecessary Party.—In an action against a husband and his wife to recover a personal judgment against her, held his failure to join her in moving for a change of venue to the county of their residence cannot affect her rights to a change.—Anaheim Odd Fellows Hall Ass'n v. Mitchell, Cal., 92 Pac. Rep. 331.

140. **Waste**—Injunction.—Equity will enjoin equitable waste by the owner of a base fee only when the contingency determining the estate is reasonably certain to happen, and the waste constitutes a wanton and unconscious abuse of the owner's rights.—Fifer v. Allen, Ill., 81 N. E. Rep. 1105.

141. **Water and Water Courses**—Interstate Streams.—In an action by a resident of Wyoming to enjoin residents of Montana from diverting water from a stream rising in Montana and flowing into Wyoming, the rights of the complainant are governed by the laws of Wyoming.—Morris v. Bean, U. S. C. C., D. Mont., 146 Fed. Rep. 423.

142.——Prescriptive Rights.—The burden is on one claiming the right to use water by prescription to establish such right, but is discharged by showing continuous occupancy and use for more than five years.—Gurnsey v. Antelope Creek & Red Bluff Water Co., Cal., 92 Pac. Rep. 326.

143.——Riparian Rights.—The right of a riparian owner to a reasonable use of the water in a stream does not authorize him to raise a dam, which destroys or materially damages the property of others.—Durga v. Lincoln Creek Lumber Co., Wash., 92 Pac. Rep. 343.

144. **Wills**—Counsel Fees on Appeal. — The counsel fees on an unsuccessful appeal by the unsuccessful proponent of a will cannot be imposed by the appellate court on the estate.—Skillman v. Lanehart, N. J., 67 Atl. Rep. 1034.

145.——Election.—The proceeds of certain insurance which a widow took because she was sole heir of her husband, the insured, held not a part of her separate estate at her husband's death, within Ann. Code 1892, sec. 4499, providing for the distribution of the husband's estate in case the widow elected not to take under his will.—O'Reily v. Laughlin, Miss., 45 So. Rep. 19.

146.——Probate.—It is incumbent on one petitioning for the probate of the will of a decedent to make satisfactory proof of the will, and, if he fails to do so, the trial court must, though there is no opposition of the probate, refuse probate.—In re Hayden's Estate, Cal., 87 Pac. Rep. 275.

147. **Witnesses**—Competency.—One having no interest in a suit involving the location of a boundary line held competent to testify with respect to the directions given him as to the running of a line by the general manager, since deceased, of one of the parties.—Douglas Land Co. v. Thayer, Va., 58 S. E. Rep. 1101.

148.——Confidential Communications.—The relation of physician and patient being established, communications by the patient to the physician will be presumed to be necessary for proper treatment in a professional capacity.—Dambmann v. Metropolitan St. Ry. Co., 106 N. Y. Supp. 221.

149.——Cross-Examination.—Where a witness in an action for injuries to stock in transit did not testify as to the cause of the injury, he cannot be asked on cross-examination whether he had not stated that the horse was killed by kicks from the other horses.—Ross v. Minneapolis, St. P. & S. S. M. Ry. Co., Minn., 113 N. W. Rep. 573.

150.—Cross-Examination of Accused.—In a prosecution for homicide, it was not error to permit the state to examine accused as to what he knew about a defense previously interposed in his behalf, which had been abandoned.—Smith v. State, Tex., 105 S. W. Rep 182.